

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE HOW PING, on habeas corpus,
Appellant,

VS.

JOHN D. NAGLE, Commissioner of Im-
migration, Port of San Francisco,
Appellee.

APPELLANT'S OPENING BRIEF.

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No. 5983

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STATEMENT OF THE CASE.

Appellant was born in China and is of full Chinese blood. He claims to be the son of Lee On, also of Chinese blood, but born in the United States.

Appellant claims the right of American citizenship by virtue of Section 1993 of the Revised Statutes.

The uncontradicted evidence shows that the father is a native citizen; that he has made three trips to China, and upon his return each time has been admitted as a citizen. Applicant's paternal grandmother is a resident of this city and has been for many years; his father lives in San Francisco, as does his step-mother,

brothers and sisters, they having been permitted to land because of the father's citizenship.

Lee On was in China at a time to make the parentage possible, and upon his return from this trip, during June, 1915, he claimed the birth of a son of applicant's age and name; and he has repeated this claim on examinations by the Immigration authorities in December, 1920, January, 1921, November, 1922, and April and November, 1928, and at the present hearing.

Applicant's uncle, Lee Poy, his father's brother, also a citizen of the United States, testified in 1927 that his brother, Lee On, had a son bearing the name of this applicant. His cousin, Lee Sing, Lee Poy's son, gave similar testimony in November, 1928. Lee On's oldest son, applicant's brother, Lee Fong, claimed applicant as his brother in November, 1922, and claims him now.

Lee On's wife, Wong Shee, in November, 1922, and April, 1928, testified that the applicant was her husband's second son by his previous marriage; and in April, 1928, a returning Chinese merchant from applicant's home town in China, Wong Suey Quong by name, testified that he had met Lee How Ping, son of Lee On and knew him as such, at the home town of Sar Hing Gong Village, in China.

Certainly this is an unusual and most convincing record.

In addition, the examining Immigration officers in their summary of the case dated August 17, 1929, find as follows:

“The demeanor of the witnesses while testifying was satisfactory. The members of the Board have expressed their opinions on page 26 of the resemblance to be found between the alleged father, the applicant and a p. 1, alleged brother,”

stating that there is a marked physical resemblance.

It is thus apparent that the applicant's right to land is established by a strong prima facie record. No evidence was introduced by the Government to offset this evidence. But the grounds for rejection were based on certain alleged discrepancies in the testimony as set forth by the Chairman of the Immigration Board of Inquiry in his said summary of 8/17/29, reading as follows:

“This applicant is applying for admission as the son of Lee On, native. Lee On has made three trips to China and upon his return from each of these trips was readmitted as a native. He departed on the essential trip making possible his paternity to a child of the age given for the present applicant, Oct. 1, 1913, and returned June 21, 1915, at which time he gave the name and birth-date for his second son in agreement with that now claimed for this applicant. When the al. father returned from China on his last trip, Nov. 15, 1922, he was accompanied by his second wife, two daughters and an al. son, Lee Fong, all of whom were admitted Nov. 24, 1922.

Statements on relationship have been taken from the al. father, Lee Fong, and the applicant. It should be noted at this time that Lee Fong departed from this port Oct. 15, 1927, and returned June 26, 1929 in company with the applicant. It should also be noted that an al. paternal uncle of the applicant, Lee Poy, departed for China on Jan. 6, 1928, and returned Oct. 3, 1928, in com-

pany with an al. son, Lee Sing, who was admitted Nov. 20, 1928. At the time of Lee Fong's departure for China, Oct. 15, 1927, he was accompanied by his stepmother and two half brothers, Lee Sing Leung and George Lee. These latter persons returned to the U. S. April 5, 1928. The following discrepancies have developed:

When Lee Fong was an applicant for admission in 1922, Lee On, the al. father testifying at that time, stated on page 2 that his son, Lee Ho Pang (Lee How Ping, the applicant) was being taken care of by Mar Shee, his brother Lee Poy's wife; that she did not live in the same house with him but in the same village; that his son, Lee Fong, was attending school for five years at that time, and that his son Lee Ho Pang, the applicant, started to attend school last year. Lee Fong testified on page 8 of that examination that his brother, the appellant, was living with his aunt, his uncle's wife, and on page 9, when asked 'What were you doing at home?' 'A. Attending school in the same village. Q. How long? A. Five years. Q. How long did your brother, Lee Ho Pang go to school? A. Two years including the present year.'

The alleged paternal uncle testifying on behalf of Lee Sing. (file 2728: 5-27) stated on page 7 that the applicant in the present case, Lee Ho Pang, lived and ate in his house until his brother and stepmother returned home in the 10th month of last year and then he returned to his own home where he lived with his brother, Lee Fong.

Lee Sing, al. cousin of applicant, testifying in his own behalf on page 15, file 27285/5-27, stated that his uncle, Lee On's first wife died in CR 5 (1916); that Lee On was married the second time to Wong Shee, CR 10 (1921) and when questioned regarding the present applicant stated that 'He came to live with us right after his mother's death in CR 5 (1916)—then he returned to his

own house when his father remarried in CR 10 (1921)' and on page 18, Lee Sing testified that the present applicant was attending school in the home village and that he attended school with him when he was smaller but he did not remember for how many years.

In the present examination the al. father testified, on page 6, that the applicant was attending school in the home village about a year and nine months before the al. father left the Sar Hing Gong Village to return to the U. S., and that the applicant started school at the age of eight; that his son, Lee Fong, and his nephew, Lee Sing, also attended school with the applicant at that time. The al. father also stated that after he came to the U. S. in CR 11 (1922) the applicant lived in the house of his brother, Lee Poy, in the same village.

Lee Fong, the p.l. brother, stated on page 11, that after his mother's death, he and the applicant lived in his uncle's house in the Sar Hing Gong Village and that he slept in that house from the time of his mother's death up to the time his father last arrived in China (1922). He also stated on page 9, that Lee Sing attended school with him and the applicant, and on recall, page 24, stated that he and the applicant were attending school together before 1922, and that they both lived in his uncle Lee Poy's house, after his mother's death occupying the room on the small door side.

The applicant stated on page 16 that he started school at the age of eight and when questioned 'How many years did you and Lee Fong attend school together?' he answered 'I do not remember that I ever attended school with him.' On page 17, he stated that he did not remember of ever having attended school with his cousin Lee Sing. The applicant stated on page 19 that after

his mother's death he went to live with his uncle's wife, and that he was living in her house when his father came home in CR 10 (1921), that he does not remember where his brother Lee Fong was living at that time; that he does not remember his brother, Lee Fong, ever having lived in the same house with him before CR 10 (1921); that he has no knowledge of his brother, Lee Fong, ever having lived in his uncle, Lee Poy's house, making the reply—'No, I do not remember anything about that at all.'

On page 9, the al. brother in giving the hours of school while he and the applicant attended together stated—'We started to school at seven o'clock in the morning and returned home for breakfast about nine o'clock in the morning and after breakfast we returned to school and remained there until four o'clock in the afternoon. At four o'clock we returned home for supper, after which we returned to school again and remained at school until seven o'clock in the evening.'

The applicant giving the school hours, that they were from 8 a. m. to 4 p. m., that he returned home for breakfast a little after nine; that he returned home at four o'clock because school was out at that time, never returning to the school at any time after four o'clock in the afternoon.

The applicant and his al. brother Lee Fong, have submitted diagrams marked exhibits 'A' and 'B' of the Sar Hing Gong Village and the locations of the dwelling houses and public building are in agreement. However, the following discrepancies have developed relative to the occupants of houses concerning which both the applicant and Lee Fong were questioned:

The applicant stated, page 20, and indicates same on his diagram, Exhibit "", that Lee Wah Nai's wife, two sons and one daughter lived in

the 1st space, 2nd row from the south, Lee Wah Nai having gone to a foreign country and that Lee Wah Nai did not live in that house while his brother, Lee Fong, was last in China. He stated on recall, page 25, when asked when Lee Wah Nai went abroad that as far as he knows he has never seen him and that he did not see Lee Wah Nai at the Sar Hing Gong Village while Lee Fong was last in China.

Lee Fong stated and indicated on his diagram, Exhibit ", that Lee Wah Nai himself, his wife, two sons and one daughter were living in the 1st space, 2nd row from the south (page 11) and on recall stated on page 24 that Lee Wah Nai was living at the time he arrived home but died about a month afterwards; relative to the death of Lee Wah Nai the applicant states on page 25 and page 26 that no deaths occurred in the Sar Hing Gong Village while his brother was last in China, nor did anyone die in Lee Wah Nai's house.

The applicant stated on page 20 and indicated on Exhibit B the second house, third row, or the house in back of his was occupied by Lee Yen Nai's wife and two sons while his brother was last in China; that Lee Yen Nai had gone to a foreign country. He stated on page 25 that he did not know when Lee Yen Nai went abroad, that he did not see Lee Yen Nai in the Sar Hing Gong Village while his brother, Lee Fong, was in China.

Lee Fong testified and indicated on Exhibit A that Lee Yen Nai, his wife and sons occupied the second house, third row while he was last in China and on recall stated on page 24 that he saw Lee Yen Nai in the Sar Hing Gong Village frequently while he was last in China, every day, when confronted with the fact that his testimony regarding Lee Wah Nai and Lee Yen Nai was in certain disagreement with the applicant, the p.l. brother

—Lee Fong, stated on page 25 ‘I know that Wah Nai is dead. Yen Nai was there and I saw him often.’

The *demeanor* of the *witnesses while testifying was satisfactory*. The members of the Board have expressed their opinions on page 26 of the *resemblance* to be found between the *al. father, the applicant* and *p.l. al. brother*.

The discrepancies above enumerated are so great that they cast a grave doubt upon the claimed relationship in this case and after a careful consideration of all the testimony adduced it is my opinion that the burden of proof has not been sustained nor the claimed relationship reasonably established and I therefore move that the applicant be denied admission to the U. S. and deported to China the country whence he came.”

The Board of Review at Washington, D. C., comments on the alleged discrepancies as follows:

“In the testimony appear discrepancies of which the following are the most material and important:

The *al. father* and the *prior landed brother*, who appeared as the applicant’s witnesses, both testified that the said *al. brother* and an *al. prior landed cousin* attended school with the applicant for nearly two years prior to the said *al. brother’s* coming to the United States in 1922. The *applicant denies* that so far as he knows, either his *al. brother* or his *al. cousin* ever attended his school while he was going there. Although he was *only about 8 years old* when his *al. brother* came to the United States, certainly it would seem that if he was old enough to go to school he was old enough to know whether his brother and cousin were going to the same school and his virtual contradiction of their statement that they attended with him must be regarded as a serious disagreement.

The al. father and the p.l. al. brother testify that the latter lived and slept in the same room in an al. cousin's house in which the applicant lived and slept. The *applicant disclaims* any knowledge that his al. brother occupied the same room or ever lived in the same house in which he lived. This also, although the period referred to was when the applicant was *only about 8 years old*, cannot be taken as an unimportant inconsistency.

The applicant testifies that the hours at the school which he attended was from 8 a. m. to 4 p. m., that he came home at 4 o'clock in the afternoon because school was out and that he never went back to the school after 4 o'clock. The p.l. al. brother on the other hand testifies that the hours at the school attended by him and his brother, who the applicant claims to be, were from 7 a. m. to 7 p. m.; that they went to school together at 7 in the morning; that they came home for dinner at 4 in the afternoon, and then that they returned at 4 in the afternoon, and that they returned together to the school to remain until 7 o'clock in the evening.

The applicant states that one Lee Wah Nai, a neighboring house holder, has been abroad as long as he can remember and he states positively that the said Lee Wah Nai was in the home village when the p.l. al. brother was last at home, from 1927 until this year. The p.l. al. brother testifies that Lee Wah Nai was there when he returned to the home village in 1927 but died about a month later. Not only is the al. brother's statement contradictory by that of the applicant regarding the presence of Lee Wah Nai in the village but the applicant also states that no resident of the home village died during the time that his al. brother was last there.

The applicant testifies that another house holder, one Lee Yen Nai, whose house is next door

to the applicant's, is also abroad and was abroad during his al. brother's visit in the home village. The al. brother on the other hand says that this next door neighbor was at home and that he saw him there every day during his last stay in the home village."

It should be noticed in this last summary of evidence that it is stated

"The applicant *denies* that so far as he knows either his alleged brother or his alleged cousin ever attended this school while he was going there."

By referring to page 17 of the original immigration record it will be noted that the testimony was as follows:

"Q. How many years did you and Lee Fong attend school together? A. I do not remember that I ever attended school with him."

Again it is claimed in this summary:

"The applicant disclaims any knowledge that his alleged brother occupied the same room or ever lived in the same house in which he lived."

Whereas by referring to page 19 of the same record it appears that he stated that *he does not remember where his brother Lee Fong was living at that time; that he does not remember his brother Lee Fong ever having lived in the same house with him before 1921; that he has no knowledge of his brother Lee Fong ever having lived in his uncle Lee Poy's house, making the reply "No, I do not remember anything about that at all."*

When it is borne in mind that appellant was seven years old and less at the times referred to, it is manifest that it is perfectly natural that he would have no memory on what probably appeared to him, as well as to us, to be very immaterial matters.

The only material facts at issue are the citizenship of Lee On and his paternity of the appellant. This has been established, first, by the records of the Immigration Service; second, by the testimony of the appellant, his father, his stepmother, his brother, his uncle, his cousin and one other Chinese witness, without any contradiction whatever on these facts. And no attempt has been made to show that any of these witnesses were of bad character, or that any of them had made at other times statements inconsistent with the present testimony. On the other hand the Immigration Board expressly states on page 30 of their record "The demeanor of the witnesses while testifying was satisfactory."

Notwithstanding this record the appellant has been denied a landing by the local immigration authorities, by the reviewing authorities at Washington and by the United States District Court for this District.

The excerpts from the testimony, which the government solely presents to substantiate the action of the immigration authorities, consists of three in number. The first and second are really a test of memory, as

to whether the boy would or would not remember them. They have reference to a time when he was but seven years of age. The third has reference to a matter which is so taboo among primitive people, that is the subject of death, that no mention was made of it.

The first matter is with regard to the home of this boy and his elder brother at the time his mother died, and until his father returned to their home in China and married again. The father's testimony and that of the elder brother was to the effect that they were taken care of by their aunt, the elder brother's wife. This applicant testified that he had been taken care of by his aunt, but did not know whether his brother was there or not. The obvious situation would be that he was; and the inspector virtually told the boy so but the response was that:

“Q. Have you any knowledge of your brother, Lee Fong, ever having lived in your uncle's, Lee Poy's, house?” “A. No, I do not remember anything about that at all.”

We see from the father's testimony that this boy was two years old Chinese reckoning and he remained with his aunt until he was about eight years old. The dates given have reference to the Chinese calendar. The American calendar is one year less, that is, the boy was one year old when his mother died and seven years old when his father returned to China.

The second matter pointed out is whether these two boys went to school together in China. It is a fact that Lee Fong, the p.l. brother, was in school in China for five years; the last year of which this appellant was

also there, but he does not remember that his brother was in school at the same time.

The third matter was the fact that Lee Wah Nai, who lived in the first space in the second row from the south, recently died in China. This applicant does not tell of the death of Lee Wah Nai, but states that he had gone abroad. We have authority in the case of *U. S. v. Pierce*, 2nd Circuit, 289 Fed. 233, the Circuit Court of Appeals, wherein it is held:

“In this particular case there was, indeed nothing suspicious in the father’s explanation to anyone familiar with the taboos of primitive people. The mention of a dead person is very taboo in primitive culture.”

The foregoing three matters are what the government marshalls forth from these records to substantiate the government’s action in the denial of this case.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in denying the petition for a writ of habeas corpus herein.

II.

That the Court erred in holding that it had no jurisdiction to issue a habeas corpus as prayed for in the petition herein.

III.

That the Court erred in holding that the allegations contained in the petition herein for a writ of habeas corpus and the facts presented upon the issue made and joined herein were insufficient in law to justify the discharge of the petitioner from custody as prayed for in the said petition.

IV.

That the judgment made and entered herein is contrary to law.

V.

That the judgment made and entered herein is not supported by the evidence.

VI.

That the judgment made and entered herein is contrary to the evidence.

ARGUMENT.

The legal grounds involved in this appeal have been before this Court in such a large number of cases, particularly in the recent cases of *Go Lun v. Nagle*, 22 F. (2d) 246; *Fong Tan Jew ex. rel. Chin Hong Fun v. Tillinghast*, 24 F. (2d) 632; *Nagle v. Dong Ming*, 26 F. (2d) 438; *Nagle v. Wong Ngook Hong*, 27 F. (2d) 650; *Lee Wing You v. Tillinghast*, 27 F. (2d) 580; *Wong Tsick Wye et al. v. Nagle, etc.*, 33 F. (2d) 226; and the very recent case of *Gung You v. Nagle, etc.*,

No. 5809 in this Court, decided on September 23rd last, that the law is well established.

We think the last case is so similar to this as to both law and fact that we can safely base our argument by a comparison of the facts and the law therewith.

As we have stated before, there is no contradiction whatever as to the evidence of the citizenship of the father Lee On, or of his paternity to the appellant; that no attempt has been made by the Government to contradict any of the evidence offered; but the Government has been content in endeavoring to show that there are material discrepancies in the testimony in other respects which render the witnesses giving it unworthy of belief.

As this Court said in the *Gung You* case,

“The testimony before the immigration authorities is in absolute agreement as to matters respecting appellant’s family relations, the principal events of his family life, and as to description and conditions in Haw Hong Village, Sun Ning District, the village in China where appellant was born and has lived all his life. That the alleged father has made various trips to China and has three sons already admitted to, and residing in this country; and that on every occasion (at least six) he has claimed to have a son Gung You, born February 26, 1915; that Gung Sam was in China at such time as to make possible his paternity to a child the appellant’s age, he having departed from the United States in June, 1913, and returned to this country in August, 1914; that the appellant’s prior landed brothers on the occa-

sion of their application for admission into the United States claimed to have a brother Gung You, born February 22, 1915. The immigration authorities also concede that the appellant bears some facial and physical resemblance to his alleged father Gung Sam, and appears to be about the age alleged."

So in this case, the testimony as to family relations, family life, conditions in the Soo Hing Gong Village, appellant's native village, are in absolute accord. The alleged father has made various trips to China, and has had one son and two daughters already admitted to, and residing in this country, and on every trip and every time he has been examined (at least seven) he has claimed to have a son Lee How Ping, born August 26, 1914; that the father Lee On was in China at such a time as to make possible his paternity to a child of the appellant's age, he having departed from the United States October 1, 1913, and returned June 21, 1915.

That appellant's prior landed brother and step-mother on the occasion of their applications for admission into this country claimed the appellant as brother and stepson respectively, and the immigration authorities concede that appellant bears facial and physical resemblance to his alleged father and alleged brother and is about the age alleged.

In the *Gung You* case, the order of exclusion was based upon certain evidence supposed to indicate fraud and discrepancies on the part of appellant, his brother and father. These discrepancies related to alleged

manufacturing of a photograph and as to when the brother quit school to come to the United States. In this case there is no claim of fraud, but the objections are based on alleged discrepancies as to the time the appellant went to school dating back to a period when appellant was eight years old or less, and to the quarters occupied at that time by the appellant and his brother.

Although the reviewing officers speak of this as a "denial" on appellant's part, the testimony as heretofore quoted in full shows that the appellant stated that he could not remember these details which he evidently considered immaterial, and which are undoubtedly immaterial to the issues involved.

It seems to us rather pertinent at this point to call the Court's attention to the methods employed by the immigration authorities in conducting their examinations. The immigration record in this case shows that the appellant was not brought before the Board for examination until he had been confined at the Immigration Station nearly two months; that he was then "advised as to the nature of and the penalty of the crime of perjury."—See page one of the record.

How a child of his age could give reasonable and coherent answers to questions after such a beginning is hard to understand. Amongst other questions the appellant was asked the following: "How often does your brother shave?" "Did you ever see him with a growth of whiskers for a day or two?" "This questioning you have just been taken over is intimate with

your home life in China. *Now, why don't you know something about it?*" To which the appellant very justly offered, "I thought the matter of shaving was of no importance so I never paid any attention to it." Also the following: "Q. Who installed the tiled floors in that house? Q. Do you know where they came from?" And much more to the same effect.

As the Court said in the *Gung You* case:

"The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy to give a weight to the presumption of law far beyond the legislative intent, or because of a policy calculated to entrap the witness into statements inconsistent with his own or other witnesses' statements, and then to pass an order of exclusion or deportation upon such variances or discrepancies as are reasonably to be expected in all human testimony, either due to lack of memory, to temporary forgetfulness, to lack of observation, or to inattention to questions, or to a failure to fully appreciate their force or significance.

When this policy is accompanied by a separate examination of witnesses without previous knowledge of the subject of interrogation, it is certain that discrepancies will be developed as to minutia of daily life. If such unavoidable and inevitable variances were utilized arbitrarily to justify the rejection of the direct testimony of witnesses, and to justify an order of exclusion, the apparent fairness of the proceedings merely give a judicial color to an obvious and predetermined injustice. *The records of the cases that have been before*

the courts already in this and other circuits, indicate a fixed policy of the Department of Labor to minutely examine and cross-examine the applicant and his witnesses and to base the order of the exclusion of the applicant upon contradiction developed between the applicant's own witnesses without seeking for confirmation or contradiction from other witnesses except as the testimony is recorded in the files of the Department of Labor."

Thus in this case the only contradictions noted in addition to those already quoted are that the appellant testified that he attended school from 8 a. m. to 4 p. m., whereas the brother stated that for a period (when appellant was a very small boy) they went to school together from 7 a. m. to 7 p. m., less going home for dinner at 4 o'clock in the afternoon. They were not even asked how they fixed their time, or whether their home or their school possessed such an object as a clock or other time piece, which to anyone knowing anything about Chinese villages is extremely doubtful.

Lastly, the question was raised as to whether a neighbor at a certain time was dead or whether, in the language of the appellant, he had gone to a "foreign country." Anyone who knows the Chinese people and their fear and superstition in regard to death might understand that "going to a foreign country" may be an expression intending to convey the idea of death, just as in certain denominations with us members thereof state that a person has "passed on."

This very question was commented upon in *U. S. v. Pierce*, 289 Fed. 233.

So, as was aptly said in the *Gung You* decision:

“Evidence concerning the town or village of the home is adapted to develop the question as to whether or not the applicant lived in the village and thus in the home from which he claims to come. But discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness and when the cross-examiner and the Board of Inquiry know nothing of the actual facts concerning the village the result is even more unsatisfactory and inconclusive. It would seem then that the discrepancy in the testimony of a witness to justify a rejection of the testimony must be on some fact logically related to the matter of relationship and of such a nature that the error, or discrepancy cannot reasonably be ascribed to ignorance or forgetfulness, and must reasonably indicate a lack of veracity. The difficulty in these cases of ‘discrepancy’ is that there is no standard of comparison. The immigration authorities know nothing of the actual facts but match witness against witness and thus develop inconsistencies. Suppose two witnesses testify that the applicant is the son of an American citizen, but entirely disagree as to some facts concerning the village from which they all claim to come, if both are shown to be wrong in some important and noteworthy feature it might justify the rejection of the testimony of both, but in the absence of other and affirmative evidence as to the actual fact how can the testimony of both be rejected? Can we as a matter of common sense, reject one because the other has told the truth, and then reject the other also? This seems entirely unreasonable.”

In that case the Court determines that

“Aside from the appearance of the witness, his demeanor on the stand, and the reasonableness of

his testimony, his character as determined by his manner of testifying or by evidence of a good or bad reputation, he can only be impeached by evidence of contradictory statements made out of court or in court on material matters. This is the law's method of measuring the credibility of witnesses."

And here the examining officers state that the appearance of the witnesses and their demeanor on the stand was good, and certainly their testimony was reasonable and no attempt was made to impeach any of the witnesses by evidence of contradictory statements. It is thus apparent that all attempts to discredit the testimony by such alleged inconsistencies must be abandoned.

There is no conflict or contradiction whatever in regard to the citizenship of Lee On, the father, or his paternity of the appellant. The same process of reasoning used by the Court in the case of *Gung You* applies with equal force to this appeal. Lee On's family has lived long in this community, and the testimony of himself and his relatives has been known to the immigration authorities for many years. On the material issues there is nothing unreasonable and nothing irregular. Affirmative evidence in the shape of an affidavit by Mrs. Ethel S. Abadie is to be found with the record of the Immigration Service which is to the effect that she has resided in Berkeley, California, over thirty years and has been acquainted with the father, Lee On, during that period of time, and that she has long known of his family affairs and that

one of his sons was still in China; and further, that his reputation for truth, honesty and integrity is good.

There is no evidence to show that he is engaged in aiding Chinese to come to this country other than his own family. And now that his wife and three other children are here with him it would be a terrific injustice for this small boy to be compelled to leave his family and return to China without any hope for future paternal care.

To again quote from the language of the *Gung You* case:

“To reject the evidence of all these witnesses as to the relationship of the applicant under such conditions and because of such a discrepancy is purely arbitrary.”

This case simply affirmed many previous decisions rendered not only in this circuit but in other circuits as well, as for example the case of *Lee Wing You v. Tillinghast*, 27 F. (2d) 580, First Circuit, where the Court held:

“The cross-examination took the wide scope described by Judge Rudkin in *Go Lun v. Nagle*, 22 Fed. (2d) 246, 247, and by Judge Bingham in *Johnson v. Ng. Ling Fong*, 17 Fed. (2d) 11, 12. *It was not directed to matters bearing even indirectly on the relationship in question; the endeavor was to find discrepancies among the witnesses as to the rows of houses, the occupants thereof, the monument or marker over grandparents' graves, etc.*

“So proceeding, the immigration tribunals succeeded in developing some very slight discrep-

ancies on matters purely collateral on which they ground their findings that the relationship is not reasonably established. But this euphemistic phrase must not be allowed to disguise the real situation. *There is here no room for honest error. The family exists as the three witnesses describe it, unless the record as a whole furnished some basis, upon which reasonable, truth-seeking minds can ground a conclusion of fraud and perjury on the part of all three witnesses. There is no conflicting evidence, direct or indirect, on the question of relationship. As noted above, the three witnesses were in absolute agreement on the vital issue of relationship and as to who the family are. We assume that these tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by the rules of reason and logic—by what is commonly referred to as common sense.*”

And the Supreme Court of the United States in the case of *Ng. Fun Ho et al., v. White*, 259 U. S. 276, held:

“To deport one who so claims to be a citizen obviously deprived him of liberty, as was pointed out in *Chin Yow v. U. S.*, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court.”

In view of the law and the facts it is very unfortunate that the Immigration Service takes the narrow

stand it does and puts these poor people to the large expense incident to an appeal to this Court. It may be possible that some of the examining officers who seem to be steeped in prejudice against those of Chinese blood take adverse action, feeling that in the majority of cases the applicants will be unable to pursue their rights through the courts, and that as a consequence their predetermined policy of exclusion will be accomplished.

We therefore ask in this case that the appeal be sustained; the American citizenship of the appellant be determined; the judgment of the lower court reversed, and instructions given to discharge the appellant from custody.

Respectfully submitted,

GEO. A. MCGOWAN,

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N. B. To take advantage of the order setting this cause for an early hearing it was necessary to get out this brief before the transcript came back from the printer. Therefore as no reference to the transcript paging could be made, we have set forth the facts herein more fully perhaps than would have been otherwise done.